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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-24

THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC.,
Petitioner,

vs.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, The Board of Trade of Kansas City, Missouri, Inc., respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in its Docket No. 76-1198, captioned *The Atchison, Topeka and Santa Fe Railway Company, et al.* v. *The United States, et al.*[1]

1. Petitions for writ of certiorari to review this judgment have already been filed with this Court by The Atchison, Topeka and Santa Fe Railway Company, et al. (No. 76-1721), and Anheuser-Busch, Inc. (No. 76-1795).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 549 F.2d 1186 and is reproduced in the Appendix (R.R. App., p. a-1) filed by a number of railroads with their Petition for Writ of Certiorari to review the same judgment of the Court of Appeals (No. 76-1721).[2]

An opinion of an Administrative Law Judge (R.R. App., p. d-1) was adopted by Division 2 of the Interstate Commerce Commission (with only two of its three members participating) (R.R. App., p. c-1). The Commission has not officially reported the Administrative Law Judge's opinion. The Commission denied full review (Anheuser-Busch App., p. e-1). Neither Division 2 nor the full Commission wrote separate opinions. Their orders (R.R. App., p. c-1; Anheuser-Busch App., p. e-1) are likewise not officially reported.

JURISDICTION

This Court has jurisdiction of this petition pursuant to 28 U.S.C. §§1254(1) and 2350(a). The opinion and judgment of the Court of Appeals were dated and entered February 24, 1977 (R.R. App., pp. a-1, a-12). A timely petition for rehearing was filed by the petitioning railroads; that petition and a petition for rehearing filed by American Bakers Association were denied by the Court of Appeals by order entered March 31, 1977 (R.R. App., p. b-1).

2. To avoid burdening this Court with multiple copies of the opinions and orders below, Kansas City Board will refer herein to the Appendices accompanying the petitions for writ of certiorari already filed with this Court by the railroads (No. 76-1721) ("R.R. App.") and Anheuser-Busch, Inc. (No. 76-1795) ("Anheuser-Busch App.").

QUESTION PRESENTED

The orderly operation of the nation's commerce in grain depends on an intricate and complex transportation system for moving grain and grain products from agricultural producing areas to storage, processing, and reshipment points and thence to the consuming areas of the country. In the intense competition between producers, elevator operators, millers, grain merchants, and producers of food for human and animal consumption, transportation costs have a significant and often overriding impact on the profitability and survival of firms. A vast quantity of grain is sold on the futures markets; stable and predictable transportation costs and competitive transportation cost relationships are vital to the orderly functioning of those markets.

The basic structure of railroad rates for transportation of grain and grain products from western producing origins through the great rail gateways (Chicago, Peoria, and St. Louis) to the East has been established for over forty years, and some elements of this rate structure have been in existence since the turn of the century. During this period, those who deal in, handle, and process grain have made vast investments in storage facilities, milling and processing plants, and distribution centers in reliance on the grain rate structure.

A fundamental component of the railroad rate structure for transportation of grain and grain products is the railroad "proportional" rate used in constructing low, through rates for grain transportation. A "proportional" rate differs from the "local" railroad rate in that a proportional rate between two points is, by definition, part of a through rate for through transportation over a through route which extends beyond the segment of line over which

the proportional rate applies. A proportional rate, by definition, cannot apply to traffic which, in contemplation of law, begins and ends at the points between which the proportional rate is published. Some additional through transportation movement—whether before the shipment moves on the segment of line, or afterward—is necessary for a shipment to move at the proportional rate.

Prior to the decisions of the Administrative Law Judge and the Court of Appeals below, it was unquestioned that no unjust discrimination in violation of Section 2 of the Interstate Commerce Act arises when the railroads establish a proportional rate (applicable to through transportation over a through route) which is lower than the local rate. This Court had expressly so ruled in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943). The railroad grain rate structure had included proportional rates since the Interstate Commerce Act was passed in 1887; the Commission had repeatedly *prescribed* grain rate structures containing proportional rates applying only to through movements; and Congress had expressly approved maintenance of proportional rates (Section 6(11) of the Interstate Commerce Act, 49 U.S.C. §6(11)).

The questions presented by this Petition for Writ of Certiorari are:

(1) whether—despite the long approval of proportional rates by the Congress, this Court, the lower courts, and the Interstate Commerce Commission, and the extensive use of such rates in the railroad grain rate structure (and also other rate structures)—the Commission was compelled to invalidate proportional rates and thus to disrupt the nation's grain rate structure, without giving any consideration to the public

interest, by this Court's opinion in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947); and

(2) whether the Commission and the Court of Appeals have now correctly discovered in the *Mechling* opinion—thirty years after it was handed down—that Section 2 prohibits application of a proportional rate to through movements over through routes whenever the proportional rates are not extended to traffic which does not move in through movements over through routes.

STATUTES INVOLVED

The statute involved in this case is Section 2 of the Interstate Commerce Act, 49 U.S.C. §2, which provides as follows:

§2. Special rates and rebates prohibited.

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

STATEMENT OF THE CASE

The Board of Trade of Kansas City, Missouri, Inc. is engaged in providing to its member-shareholders facilities and services for the buying, selling, and trading of grain and grain products. The members of the Board are involved in various aspects of the grain industry, and many ship grain and grain products to various destinations in the Eastern United States. Many of these shipments move over the through routes at the through rates involved in this case; other shipments by members of the Kansas City Board move to other destinations over other through routes at through rates constructed on a similar basis.

Grain arrives at Chicago by rail, lake vessel, barge, and truck (R.R. App., p. d-46). The railroads are required to establish through routes with one another and with water carriers (but not with trucks) for grain moving into Chicago by rail or water carrier and then to the East by rail (49 U.S.C. §1(4)). They have complied with their obligation to establish through routes by maintaining "proportional" rates, which apply to the eastbound portion of through movements of grain or grain products brought to Chicago by rail, barge, or lake vessel (R.R. App., p. d-4). Where grain shipped by rail to the East does not move in a through movement—for example, grain brought to Chicago under intrastate rail rates or grain which has forfeited its transit privileges—it would be charged a "local" rail rate which is higher than the proportional rate. The proportional rate—which by definition is a part of the through rate applicable to the through transportation into and then east from Chicago—thus does not apply to local movements of grain from Chicago to the East.

The railroads are expressly *not* required to maintain through routes and rates with trucks (49 U.S.C. §316(c)),

and the railroads operating from Chicago to the East have declined to establish through routes and rates with trucks bringing grain to Chicago. Accordingly, the railroads treat grain which arrives at Chicago by truck the same as any other eastbound movement of grain which is not part of a through movement over a through route—that is, they apply the local rate to the trucked-in grain just as they apply it to grain which arrives at Chicago by rail under intrastate rates or to grain which has forfeited its transit privileges.

The Chicago Board of Trade complained to the Commission that the Eastern Railroads violated Section 2 of the Interstate Commerce Act, 49 U.S.C. §2, by applying proportional rates to the eastbound portion of the through movements of wheat (and products thereof) which arrived at Chicago by rail or water carrier but the higher local rates to the eastbound movement of wheat (and products thereof) which arrived at Chicago by truck. It sought an order requiring the railroads to remove this alleged discrimination.

An Administrative Law Judge of the Commission concluded that the Eastern Railroads did violate Section 2 by applying local rates to wheat which had arrived at Chicago by truck while applying proportional rates to wheat which had arrived at Chicago as part of a through movement by rail, barge, or lake vessel (R.R. App., p. d-31). He based his decision on two opinions of this Court involving barges: *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947), and *Interstate Commerce Commission* v. *James McWilliams Blue Line, Inc.*, 342 U.S. 951 (1952)—a per curiam affirmance, on the basis of *Mechling*, of *James McWilliams Blue Line, Inc.* v. *United States*, 100 F.Supp. 66 (S.D.N.Y. 1951). He found that the Eastern Railroads' "service is exactly the same

on the Chicago-to-the-east move whether the wheat arrived at the mill or elevator by rail, water or truck . . ." (R.R. App., p. d-30), and he ordered the railroads to remove the discrimination (R.R. App., pp. d-31-32). Division 2 of the Commission, with only two of its three members participating, adopted the Administrative Law Judge's decision (R.R. App., p. c-1). The Commission refused to grant full review of the decision of Division 2 (Anheuser-Busch App., p. e-1).

Because the Administrative Law Judge and the Commission exercised no expertise in reaching their decisions and totally failed to consider the impact of their decisions on the grain rate structure, Kansas City Board requested the Commission to reconsider its refusal to grant review by the full Commission. We pointed out that the actions of the Administrative Law Judge and Division 2 "will not only result in higher rates, but will be instrumental in the destruction of the grain rate structure as it exists today" (Anheuser-Busch App., p. g-1). We also contended that the decision of Division 2 "would also have a profound nationwide effect in any instance where proportional rates are in effect, and could well lead to the imposition of higher rail rates nationwide on many commodities." (*Id.*; *see also* Anheuser-Busch App., pp. i-1, i-2 to i-3). Many other shippers of grain and grain products[3] also asked the Commission to reconsider the decision.

Following the Commission's refusal to reconsider its decision, a petition for review of the Commission's orders

3. Anheuser-Busch, Inc.; A.E. Staley Manufacturing Co.; Agway, Inc.; Barley and Malt Institute; Archer Daniels Midland Co.; ITT Continental Baking Co., Inc.; General Foods; Ralston Purina Co.; Bay State Milling Co.; Garvey, Inc.; Penick & Ford, Ltd.; International Multifoods; Farmers Union Grain Terminal Association; American Feed Manufacturing Association; The Hubinger Company; Peavey Co.; The Pillsbury Company; Lincoln Grain, Inc.; Krause Milling Co.; Roman Meal Company; and Jos. Schlitz Brewing Co.

was filed by the railroads with the United States Court of Appeals for the Eighth Circuit.[4] Kansas City Board was granted leave to intervene in that proceeding as a Petitioner (Anheuser-Busch App., p. f-1), along with Anheuser-Busch, Inc., and American Bakers Association.

The Court of Appeals denied the petition for review on the ground that the Commission's decision was "mandated" by this Court's opinions in *Mechling* and *Blue Line* (R.R. App., p. a-11, n.9). It held that this Court had precluded the Commission from exercising any expertise or taking into consideration the disruptive effects of its decision on the grain rate structure, stating (*Id.*):

> Petitioners additionally contend that the Commission erred in failing to consider the disruptive consequences of its decision on the national grain rate structure. In view of our holding that the Commission's decision was mandated by *Mechling* and *Blue Line*, we find no merit to this contention.

The Court of Appeals held that it was "beside the point" under Section 2 that "the truck-rail transportation of grain is a local movement whereas the rail-barge, lake-rail movement is a through movement" (R.R. App., p. a-10). Petitions for rehearing filed by the railroads and American Bakers Association were denied (R.R. App., p. b-1).

Petitions for writ of certiorari to review the judgment of the Court of Appeals were then filed with this Court by the railroads (No. 76-1721) and Anheuser-Busch, Inc. (No. 76-1795).

4. The Court of Appeals [illegible] jurisdiction of the review proceeding pursuant to 28 U.S.C. 2321 *et seq.* and 2341 *et seq.* Petitioner, The Board of Trade of Kansas City, Missouri, Inc., participated in the proceedings before the Interstate Commerce Commission (Anheuser-Busch App., pp. g-1, i-1) and was permitted to intervene in the review proceedings as a Petitioner by order of the Court of Appeals (Anheuser-Busch App., p. f-1).

REASONS FOR ISSUING THE WRIT OF CERTIORARI

This case is of paramount importance to the commerce in grain throughout the country, to consumers of grain products, and to producers and consumers of every other product which moves by rail on proportional rates. The decisions of the Court of Appeals and the Commission will create chaos in the grain trade, leading to unstable marketing conditions and efforts by the railroads to eliminate proportional rates and charge the higher local rates. Moreover, the Court of Appeals' reasoning that the through or local character of a movement is "beside the point" under Section 2 calls into question the validity of all proportional rates and thus threatens to undermine the rate structures applicable to every commodity which moves on proportional rates.

The railroad grain rate structure is one of the nation's most important transportation rate structures. Grain is the staple of the nation's diet, and provides a substantial part of the nourishment of animals raised for use as food. Any disruption in the orderly flow of grain transportation or grain marketing carries a substantial possibility of direct impact on the nation's dinner tables and pocketbooks.

In the highly competitive conditions which are characteristic of the grain business, transportation costs have an important effect on the price of grain and grain products and on the profitability of the firms engaged in the grain business. The railroad grain rate structure incorporates a number of characteristics which are vital to the orderly marketing and processing of grain and grain products. Chief among these features is the ability of grain to move in a through movement at a through rate from point of

origin to consuming destination. Because these through rates are lower than the sum of the local rates over the same segments of line, the availability of through rates significantly reduces transportation costs.

A principal method of constructing through rates in the grain rate structure employs a "proportional" rate for a portion of the through movement over the through route from producing origin to consuming destination. The proportional rate is lower than the "local" or "flat" rate over the same segment of line; this lower level of the proportional rate results in a through rate over the through route which is lower than the sum of the local rates.

The grain rate structure has now been built upon proportional rates for nearly a century. During that time it has never been questioned that a proportional rate differs from a local rate in that, by definition, the proportional rate is part of the through rate for through transportation beginning before or continuing after the portion of the through movement to which the proportional rate applies. Thus, the railroads maintain inbound local rates to particular markets and outbound proportional rates applicable to through transportation between markets and from markets to consuming destinations. This method of constructing grain rates was adopted by the Commission in its prescription of the grain rate structure for midwestern points.[5]

If these through rates cease to be available, Kansas City shippers and others will be faced with threatened

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5. *See Grain and Grain Products Within the Western District and For Export*, 164 I.C.C. 619, 634, 645 (1930); 205 I.C.C. 301, 327-28 (1934); and page 15 *infra*.

A recent publication of Chicago Board of Trade has noted (*Grains-Processing, Production, Marketing*, p. 50 (1977):

> The oldest proportional rate published applies from Chicago to New York. All other rates in Official Territory are related to this, usually on a mileage percentage basis.

substantial increases in transportation costs,[6] and the present essential equalization of through rates from producing origins through the three rail gateways of Chicago, Peoria, and St. Louis to the east will be destroyed.

Further, over many decades the relative levels of proportional rates and the availability of proportional rates making low through rates available for shipping grain and grain products have come to provide a basis on which the participants in the grain trade have made tremendous investments in storing, milling, and distributing facilities. Also, transactions involving many millions of dollars are executed on the futures markets every day in reliance on the present railroad rate structure.[7] Now, if one of the

6. In response to the Commission's order, the Eastern Railroads initiated a proposal to cancel all of their proportional rates applicable to grain and grain products throughout Central territory. Implementation of this proposal was postponed pending judicial review. This proposal, if successful, would increase transportation costs from Kansas City, Missouri, approximately 15 to 16 percent, based on rate levels as of March 1, 1976.

While Kansas City Board does not concur in the Eastern Railroads' proposal, it does wish to emphasize the extreme difficulty and risk involved in relitigating the eastern grain rate structure, which has proved suitable and satisfactory. The extraordinary complexity of grain rate structure litigation is illustrated by the Commission's acknowledgement that its Docket 17,000, Part 7 investigation comprised "threescore and more of major issues, affecting every part of a vast territorial domain, each of which would ordinarily present a case of more than average importance. . . ." *Grain and Grain Products Within the Western District and For Export*, 164 I.C.C. 619, 697 (1930). A subsequent report in the same case contains over one hundred fifty topic headings resolving or discussing disputes concerning the grain rate structure. *See* 205 I.C.C. at 329-471. Moreover, the eastern grain rate structure could not be modified without creating pressure to disrupt the western grain rate structure.

7. In 1976, at the Kansas City grain market alone, contracts for sale of over 3.4 billion bushels of wheat were traded. Moreover, during 1976, contracts for sales of over 72 billion bushels of grain were traded on the nation's principal grain markets. *See Chicago Board of Trade Statistical Annual, 1976*, at p. 6 (1976). Prices of grain futures during 1976 on the Chicago Board of Trade (which accounted for almost 66 billion bushels of trading volume, *Id.* at 5) averaged over $2.50 per bushel for wheat, over $2.30 per bushel for corn, over $1.35 per bushel for oats, and over $4.50 per bushel for soybeans (*Id.* at 7-68, 234-244).

underpinnings of the grain rate structures is torn loose, not only will the investments of the grain producing, storing and milling industry face the threat of devaluation, but also the millions of dollars invested in future contracts will likewise be threatened.

What is so terribly incongruous is that these disastrous consequences will be visited upon the grain business and the nation without having been considered by the Commission and without any reasoned conclusion that the public interest will be served thereby.[8] This is astonishing in the face of the fact that the Commission, itself, has recognized the extreme interdependence of the grain rate structure and the flow of grain products. In its landmark investigation of the grain rate structure (*Grain and Grain Products Within the Western District and For Export*, 164 I.C.C. 619, 697 (1930)), the Commission observed that "wheat is the most liquid commodity known in transportation" and that "[r]ates on wheat are closely related to one another, and even a slight change in one will ordinarily affect the movement governed by the others." It compared the grain rate structure to a "huge blanket covering the entire country" and noted that "a pull on any part of this blanket . . . will be felt in every other part" (*Id.*).

More recently the Commission's Special Projects Staff again recognized the damaging effects of the Commission's

8. The Commission gave no explanation whatever for the discrepancy between its action below and its previous actions approving construction of the grain rate structure based on proportional rates. This failure is contrary to this Court's repeated holdings that an administrative agency "must 'give clear indication that it has exercised the discretion with which Congress has empowered it.' [citation omitted] The agency must make findings that support its decision" (*Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962)), and must explain "its departure from prior norms" (*Secretary of Agriculture v. United States*, 347 U.S. 645, 652-53 (1954)) so "that the reviewing court may understand the basis of the agency's action. . . ." (*Atchison, T. & S.F. Ry. v. Wichita Board of Trade*, 412 U.S. 800, 806-08 (1973)).

decision and strongly urged the Commission to withhold the decision until its effects on the grain rate structure could be taken into account (Opening Statement of Fact and Argument, p. 2, Ex Parte No. 270, Sub-No. 9 (1976)):

> This ruling [in the Chicago Board of Trade Case] may result in a significant modification of the historic pattern of gathering rates from country origins and intermarket proportionals currently charged by the nation's railroads for the shipment of grain and grain products.

We respectfully submit that the foregoing considerations demonstrate the devastating impact of the decision of the Court of Appeals and, accordingly, the necessity of review by this Court. We shall hereinafter discuss the errors in the Court of Appeals' reasoning that led it to conclude that such devastating impact was not a proper subject for consideration.

I. The Court of Appeals Erred in Holding That This Court Had Foreclosed the Commission From Considering the Effect of Its Ruling on the Grain Rate Structure and the Public Interest

The holding of the Court of Appeals that the Commission may not consider the catastrophic effects of its ruling on the public interest is directly contrary to decisions of this Court. When the Commission was creating the western grain rate structure in its massive Docket 17,000, Part 7, investigation, Kansas City Board challenged a Commission order requiring that proportional rates on movements outbound from Kansas City be the exclusive means of making through shipments by rail from Kansas City to the east (*Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, at 535 (1942)). The Commission there *prescribed* proportional rates which are indistinguishable from the rates held below to be discriminatory as a matter of law.[9] Yet in that case this Court, speaking through Mr. Justice Frankfurter, upheld the action of the Commission because the extreme complexity and interrelated character of the grain rate structure required the Commission to exercise its informed discretion free of judicial interference (314 U.S. at 546):

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. . . .

The Court then held that the Commission had properly recognized that

> the wisdom of its action had to meet the test of experience. Therefore, it treated its conclusion as part of a continuing process, and requested the parties to give the system which it adopted a "reasonable trial," contemplating such future consideration as the practical operation of the system would require.

(314 U.S. at 547).

The decision of the Court of Appeals below turns this Court's opinion in *Board of Trade of Kansas City* on its

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9. The Commission described its ruling in Docket 17,000 as follows (205 I.C.C. at 327-28):

> The general plan of the Part 7 adjustment was the prescription of specific local or flat rates from selected origins . . . in the various grain producing areas to the so-called rate break markets; proportional rates, lower than the flat rates, from those markets to final markets and other destinations . . .; [and] through rates equal to the combinations of the inbound flat rates and outbound proportionals. . . .

head. The Court of Appeals has held that application of proportional rates to through movements but not to local truck-rail movements violates Section 2 as a matter of law; yet in *Board of Trade of Kansas City*, the Commission prescribed proportional rates lower than local rates and applicable only to through transportation, and this Court sustained those rates against our Section 2 challenge. The Court of Appeals has held that the Commission may not consider the disruptive effects of its decision on the grain rate structure; yet in *Board of Trade of Kansas City*, this Court sustained the Commission's actions *because* they rested on application of the expertise of the Commission and on the Commission's weighing of the factors affecting the public interest. The Court of Appeals has held that the railroad rate structure eastbound from Chicago is invalid as a matter of law, even though that rate structure and Section 2 have co-existed in harmony for over seventy years and have served the needs of the grain trade; and even though in *Board of Trade of Kansas City*, this Court approved the Commission's decision to give its order a practical test and to maintain it unless practical considerations relating to the operation of the grain trade required a change.

The Court of Appeals specifically held that the Commission was compelled to ignore the public interest, contrary to this Court's decision in *Board of Trade of Kansas City*. We respectfully submit that this Court's decision in *Board of Trade of Kansas City* should not thus be wholly undermined without plenary review by this Court. Moreover, it is impossible to believe that this Court in *Mechling* intended to compel the chaos and disruption which would result from relitigating the grain rate structure after the fundamental premise on which it was built has been declared invalid.

II. The Court of Appeals Erred in Holding That the Commission's Decision Was "Mandated" and "Compelled" by This Court's Opinions in *Mechling* and *Blue Line*

The Court of Appeals and the Commission treated the decision below as though it was compelled by a part of the *Mechling* decision which had somehow escaped attention for almost thirty years. However, both the Court of Appeals and the Commission totally overlooked the fundamental distinction under Section 2 of the Interstate Commerce Act between through movements over through routes and local movements which do not move over through routes. In holding that Section 2 requires the same rate for a local movement as for a through movement, the Court of Appeals misunderstood *Mechling* and denied the principle, affirmed by this court in *Inland Waterways*, that Section 2 does not require that proportional rates be extended to local movements.

The proceeding below involved wheat brought to Chicago in local movements by *truck*. By contrast, *Mechling* involved grain brought to Chicago by *barge* over portions of through routes and turned on the special protections for water carriers provided by Congress in the Transportation Act of 1940. The instant case turns on provisions of law applicable to trucks which are diametrically opposite to the provisions dealing with barges which were controlling in *Mechling*.

A shipper of traffic moving by truck and then by rail does not have the right by law to compel the railroad to carry that traffic at a through rate over a through route for Congress has expressly provided in Section 216(c) of the Interstate Commerce Act, 49 U.S.C. §316(c), that railroads and trucks are *not* required to establish through

routes for transportation of property. This Court has repeatedly so held.[10] The Eastern Railroads have exercised their right not to establish through routes with trucks for transportation of grain and grain products to Chicago by truck and thence to the East by rail.

A shipper of traffic moving first by barge or rail and then by rail, on the other hand, *does* have the right by law to compel the railroad to carry that traffic on the second leg of the movement at a through rate in a single through movement over a through route. Railroads have been required to maintain through routes and rates with each other for many decades (49 U.S.C. §1(4)), and have been required to maintain through routes and rates with barges since the Transportation Act of 1940 (49 U.S.C. §§1(4), 905(b), 907(d)). Accordingly, the proportional rates apply to grain moved from Chicago to the East which arrived at Chicago in a through movement by rail or barge over the through route. (See generally *Thompson* v. *United States*, 343 U.S. 549, 556-558 (1952).)

Mechling held that Section 2 prohibited the railroads from charging different proportional rates to traffic moving in "*through shipments*" over "*through routes*" via barge than to through traffic between the same origin and the same ultimate destination via rail (330 U.S. at 570-71).[11] This Court reached its conclusion only after an extensive

10. *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 410 (1967); *ICC* v. *Parker*, 326 U.S. 60, 72 & n7 (1945).

11. The *Blue Line* litigation also involved through movements over through routes from mine origins to Hampton Roads by rail, then to New England ocean ports by barge, and then to New England interior ports by barge or rail (100 F.Supp. at 69). The proportional rates in *Blue Line* applied over the first segment (mine origins to Hampton Roads) of the through movement, while in *Mechling* they applied over the last segment (Chicago to the east) of the through movement. This Court's opinion in *Blue Line* consists of a one-sentence affirmance and a citation to *Mechling* (342 U.S. 951).

analysis of provisions added by the 1940 Transportation Act which were designed specifically to protect barge lines (330 U.S. at 574-77). *Mechling* did not hold that all movements over the same segment of line, whether through or local, must move at the same rate.

Indeed, in an earlier stage of the controversy which led to *Mechling* this Court had expressly affirmed the lawfulness of proportional rates applied only to through movements. In *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943), certain barge lines had "pitched their case" seeking application of railroad proportional rates to their traffic on the proposition that to deny barge-arrived grain the same proportional rates applied to rail-arrived grain violated Section 2 "since the physical carriage beyond Chicago was substantially the same" on the eastbound movements of grain from Chicago (319 U.S. at 683). This Court rejected that Section 2 claim because through movements were essentially different from local movements. It noted that proportional rates "*lower than local rates for like outbound transportation*" had a long history and had been extensively employed in the grain rate structure, and that "long hauls have generally been thought entitled to move at a rate lower than the sum of the rates for local or short hauls between intermediate points" (319 U.S. at 684) (emphasis added). The Court saw "no reason for repudiating" proportional rates by holding that they must be extended to local transportation movements (*Id.* at 684-85).

Congress changed the status of barge lines in the 1940 Transportation Act by requiring railroads and barges to establish through routes with one another and by providing other protections to barge lines and their traffic. This Court's decision in *Mechling* implemented those changes in law. But Congress has *not* provided the trucks through

route status with the railroads (Section 216(c), 49 U.S.C. §316(c)). Grain brought to Chicago by truck thus has the same status as grain brought to Chicago by barge prior to the 1940 Transportation Act; that is, it is not entitled to move east from Chicago at a through rate over a through route. Like all other local traffic, it is only entitled to move east at the local rate.

In holding that the through or local character of the movement eastbound from Chicago was "beside the point" (R.R. App., p. a-10), the Court of Appeals failed to recognize that by its very nature a proportional rate applies only to through transportation and cannot apply to local transportation.[12] The railroads apply their proportional rates to all through movements from Chicago to the east. They apply their local rates to all local movements eastbound from Chicago, that is, to grain grown at Chicago, to grain brought to Chicago *by rail* at intrastate rates, and grain brought to Chicago by truck. If the railroads were required to apply the same rate to a local movement (the eastbound haul of trucked-in grain) as to all through movements, the distinction between proportional rates and local rates would be erased, and the use of proportional rates as part of through rates for through movement of grain and grain products would be eliminated.

The Court of Appeals erred by focusing on two sentences in the *Mechling* opinion (the first two sentences of the first full paragraph at 330 U.S. 557), which explicitly apply to *barge* traffic moving in through movements over through routes and expressly refer to protection

12. This Court in *Inland Waterways* had previously rejected the notion that rail proportional rates must be applied to all movements eastbound from Chicago because the service of the Eastern Railroads was the same for the through and local movements (319 U.S. at 683-84). Yet the Court of Appeals relied on the similarity of costs in finding that *Mechling* "compel[led]" the Commissions's holding (R.R. App., p. a-10).

for *barges* added by the 1940 Act. The Court of Appeals applied those sentences to truck traffic, which is governed by entirely different provisions enacted by the 1935 Motor Carrier Act. The Court of Appeals thus incorrectly assumed that by those two sentences this Court referred only to Section 2 and ignored the changes wrought by the 1940 Act, demolished the distinction between through and local movements, overruled its prior opinion in *Inland Waterways* (without a word to that effect), undermined its own approval of proportional rates as an integral part of the grain rate structure in *Board of Trade of Kansas City*, and disapproved almost a century of rate practice under the Interstate Commerce Act. This untenable construction of *Mechling* overlooks the significance of the 1940 Transportation Act to the *Mechling* decision, and applies provisions established in that Act for the benefit of barge line traffic to motor carrier traffic, which is governed by the wholly different structure established in the 1935 Motor Carrier Act (49 U.S.C. §316(c)).

The confusion of the Court of Appeals and the Commission with respect to the applicability of this Court's decisions, and with respect to the entirely different regulatory structures provided by Congress for barges and trucks, furnishes an additional reason why this Court should review the judgment of the Court of Appeals.

CONCLUSION

The grain rate structure has served the nation well for many decades and has been the basis of substantial investments by participants in the grain trade. The Commission has recognized the unusual interdependence and sensitivity to changes of the grain rate structure. Despite these considerations and this Court's opinion in *Board of*

Trade of Kansas City, the Commission below totally failed to consider the disruptive effect of its decision.

The Interstate Commerce Act, as amended by the Transportation Act of 1940, has specifically permitted railroads to treat traffic tendered to them via truck differently from traffic tendered via rail or via barge. The formation of a through route with trucks is entirely optional with the railroads (Section 216(c), 49 U.S.C. §316(c)), while a through route must be formed with other railroads and with barges (Section 1(4), 49 U.S.C. §1(4)). The application of proportional rates to wheat arriving at Chicago by rail or by barge reflects the eastern railroads' formation of through routes with the western railroads and with the barge carriers as required by law.

Now, by misuse of Section 2, the opinion of the Court of Appeals threatens to nullify Section 216(c) and this Court's prior decisions[13] by holding that Section 2 is violated when railroads stand on their right not to form through routes with trucks. The practical effect of the Court of Appeals' decision is to amend Section 216(c) and Section 1(4) by adding an obligation of railroads to form through routes with motor carriers. Congress has expressly declined to make either of these changes, and these radical amendments to the Interstate Commerce Act should not be "legislated" by the Court of Appeals without review by this Court.

Moreover, the Court of Appeals' decision will invalidate proportional rates under Section 2 because it cannot be limited to comparisons between truck traffic on the one hand and barge or rail traffic on the other hand. The distinction between through and local movements is basic to the validity of proportional rates, which by definition apply only to through movements. If the distinction between through and local movements is "beside the point" —the very premise of the Court of Appeals' decision (R.R. App., p. a-10)—then no proportional rate could be lawful under Section 2, whether the proportional rate be applied to the last, rail portion of rail-rail, truck-rail, or barge-rail movements. In each case a proportional rate lower than a local rate on the outbound, rail leg of the transportation would violate Section 2 according to the decision of the Court of Appeals because it would be "beside the point" that the rail-rail, or barge-rail movement was a through movement whereas a movement of grain grown locally and delivered to the railroad from the same elevator would be a local movement. Such an absurd result is contrary to this Court's opinion in *Inland Waterways*, to nearly a century of rate making under the Interstate Commerce Act, and to numerous decisions of the Commission prescribing proportional rates as part of the grain rate structure.

13. *See* p. 18, n. 10, *supra*.

It is incongruous that the Court of Appeals and the Commission below base this deviation from a century of rate making on this Court's opinions in *Mechling* and *Blue Line*, which are about thirty years old. Further, in justifying its decision, the Court of Appeals disregarded this Court's holdings in *Inland Waterways* and *Board of Trade of Kansas City*. Rather than fulfilling its responsibilities by considering the effects of its decision on the public interest, the Commission shielded itself behind its erroneous reading of *Mechling* and *Blue Line* and extended those decisions—dealing with *through* movements involving *barges* and the special protections provided by the 1940 Act—to *local* movements, involving *trucks*, which are governed by an entirely different statutory framework and, then, the Court of Appeals compounded this error

by holding that this Court had *compelled* the Commission to ignore the disruptive consequences of its ruling because the through or local character of the movement was "beside the point." (R.R. App., p. a-10).

The opinion of the Court of Appeals thus presents a serious threat to the orderly operation of the grain business, to the enormous investments made by the grain trade and others in reliance on railroad rate structures built upon proportional rates, to the integrity of this Court's holdings in *Inland Waterways* and *Board of Trade of Kansas City,* and to the preservation of the Congressional policy of establishing different through route relationships between barges and railroads than between railroads and trucks. These threats are too serious to be permitted without full review by this Court.

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-24

THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC.,
Petitioner,

vs.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF PETITIONER

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REPLY OF PETITIONER

Petitioner, The Board of Trade of Kansas City, Missouri, Inc. respectfully submits this Reply to the Brief and Memorandum in Opposition filed by Respondents.

I. Interest of Kansas City Board.

Chicago Board of Trade has attempted to belittle the intense interest of Kansas City Board in reversal of the decisions and orders below. Chicago Board suggests that Kansas City Board, and other shippers of grain and grain products, lacked earnestness in their efforts to alert the

Commission to the disastrous effects of its ruling and to urge the Commission to reconsider that decision (Brief, p. 12). So that our client's sincerity is clear to this Court, it must be pointed out that Kansas City Board (along with many other shippers) filed communications and petitions with the Commission seeking leave to intervene, reconsideration of the decision, or reopening of the proceeding. All of these communications and petitions were accepted for filing by the Commission and became part of the record before the Commission and on review. In view of the continuing participation of Kansas City Board in the review proceedings, it is highly inappropriate for Chicago Board of Trade to suggest that the serious disruption of the rate structure threatened by the decisions below is of little concern to Kansas City Board.

II. Consideration of the Public Interest.

Respondents' Briefs do not deny the importance of the level of railroad grain rates to the price of food and the stability and prosperity of the grain business. They do not deny that the grain trade has invested enormous sums of money in storage, processing, and distribution facilities in reliance on the grain rate structure and its provisions which allow movement of grain on low, through rates from producing origins to consuming destinations. Respondents also do not deny that the tremendous investments in grain futures contracts are profoundly affected by the stability and relative level of grain rates.

Despite these incontrovertible facts, Respondents' first position is that the disastrous effects on the public of the rulings of the Court of Appeals and the Commission are irrelevant to this case.

Kansas City Board submits that the very assertion that the public interest is irrelevant in a case involving

the vital grain rate structure is startling and directly contrary to *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534 (1942). That decision held that "The process of rate making is essentially empiric" and that questions relating to the grain rate structure should therefore be entrusted to the Commission to resolve in the exercise of its expert discretion (*id.* at 546). This Court unambiguously rejected the notion that the courts should substitute their own views of wise policy for those of the Commission where the complex system of grain rates and grain marketing is involved, and also rejected the idea that grain rate litigation should be decided without reference to the practical operation of the rate structure and the needs of the grain business.

Obviously uncomfortable with the position that the public interest is irrelevant (which is the position of the decisions of the Commission and the Court of Appeals), the Federal Respondents (and to a certain extent, Chicago Board of Trade) have now adopted in their filings with this Court a *second* position that, if the public interest is relevant, then it was considered.[1] This attempt to supply a basis of decision other than that chosen by the Commission is contrary to the decision of the Court of Appeals,

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1. The Federal Respondents imply that the Commission's statement that the rates were "unjustifiably discriminatory" was an evidentiary fact or an expression of a discretionary determination (Memorandum, p. 3). However, the Commission's finding of "unjustifiable discrimination" was nothing more than a statement of an ultimate legal conclusion which the Commission and the Court of Appeals believed to be compelled by *Mechling*. It did not flow from any exercise of transportation expertise or consideration of the public interest.

Chicago Board erroneously states that the Commission and the Court of Appeals gave "due consideration to the public interest" (Brief, p. 12). In fact, neither the Commission nor the Court of Appeals gave any consideration at all to the public interest because they erroneously believed that their decisions were compelled by *Mechling*.

to the Federal Respondents' own brief in the Court of Appeals,[2] and to the position advocated throughout this litigation by Chicago Board of Trade.[3] It also violates the rule of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), that Commission decisions must be defended on the grounds adopted by the Commission and not by supplying new theories in appellate briefs. The Commission unquestionably exercised no discretion but instead concluded that its decision was required by *Mechling*.

III. Section 216 (c).

Our Petition argued that the Court of Appeals had failed to give effect to the Congressional policy against requiring truck-rail through routes (Section 216(c), 49 U.S.C. §316(c), Petition, pp. 17-20).

Respondents have failed to answer this point. They have chosen totally to ignore Section 216(c). Undoubtedly, that is because the Court of Appeals' decision has improperly "repealed" that policy of Section 216(c).

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2. In the Joint Brief of the United States and the Commission filed with the Court of Appeals, the United States argued that the Commission had exercised discretion in making its ruling below. The Commission refused to join this argument, thereby conceding that it had not exercised any discretion or employed any transportation expertise (Joint Brief of United States and Interstate Commerce Commission before the Court of Appeals, p. 16, p. 4).

3. Chicago Board of Trade has consistently argued that the Commission's decision below was "compelled" by *Mechling* as a matter of law.

CONCLUSION

Respondents' Briefs in Opposition present no arguments which would detract from the importance of review by this Court. Indeed, they reinforce our arguments that review is vitally important. Therefore, we respectfully pray that our Petition for Writ of Certiorari to review the judgment below be granted.

Respectfully submitted,

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